

Confining Pogge's Analysis of Global Poverty to Genuinely Negative Duties

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The existence of global poverty is uncontroversial. None would deny that there are people in this world who suffer not only relative but absolute deprivation. Recognizing this fact forces those of us who live relatively affluent lives in relatively affluent countries to consider what obligations we have to improve the lot of impoverished people around the world. Those who reject the view that we have extensive obligations to distant strangers often appeal to a distinction between negative and positive duties. Negative duties, we can imagine them saying, are duties not to harm others. They are willing to concede that such duties are stringent, which is to say that they are not easily overridden, but they assert that duties not to harm cannot ground a general obligation to the global poor. Instead, they see any such general obligation as necessarily grounded in positive duties, or duties to help. On one version of the argument, these positive duties are not properly considered duties at all. Helping is instead at most supererogatory and never required. On another version, positive duties count as genuine duties, but are seen as far less stringent than negative duties and therefore more easily overridden. Purported obligations to provide assistance to distant strangers suffering from poverty turn out to be particularly weak, or so it is claimed, because they are properly subordinated to a host of positive duties of assistance to family, friends, community members and fellow citizens, as well as a permission to give special consideration to one's own interests and projects.

There are several ways to resist this line of argument. To begin with, one might reject the distinction between negative and positive duties as conceptually confused. One might, for instance, argue that not helping just is a form of harming, which would be to deny that we can even distinguish between

supposedly negative and positive duties.¹ Another possibility would be to accept the conceptual distinction between positive and negative duties, yet reject its moral relevance. One could perhaps argue that positive duties are, other things being equal, just as stringent as negative duties. Or one could offer a more narrowly tailored argument according to which the specific positive duties to assist those suffering from severe poverty are just as stringent and demanding as the negative duties not to harm them, leaving it open whether or not it is generally true that negative duties are more stringent than positive ones.

For roughly the past twenty years, Thomas Pogge has been pursuing an alternative line of response. His strategy is to concede, at least for the sake of argument, that there is a genuine, morally significant distinction between positive and negative duties. On his view, however, this does not undermine the force of our obligations towards distant strangers, because he thinks that on closer inspection these obligations turn out to stem not from positive duties but from negative ones

From a strategic standpoint, it is easy to see the appeal of Pogge's approach. As he points out, if he is correct that there are substantial negative duties engaged by global poverty, then he can demonstrate highly stringent obligations towards the global poor without needing to resolve the contentious debate over the status of positive duties (see, e.g., Pogge 2004: 278, Pogge 2005c: 5). This allows him to avoid challenging what he describes as the common sense view according to which, provided we hold fixed what is at stake, there is a hierarchy of duties that places negative duties at the top of the list, followed by a series of positive duties whose range expands gradually from "next of kin" to "unrelated foreigners" (Pogge 2008: 138). Given this widely accepted hierarchy, the aim of his argument is to demonstrate that "global poverty engage[s] our *negative* duty not to harm others unduly, and thus command[s] a place at the top, rather than the bottom, of our priority list" (Pogge 2008: 142).

In this paper, I will follow Pogge's lead and focus on the negative duties associated with global poverty. My most immediate aim will be to raise an objection against Pogge's analysis of these negative duties and argue that Pogge overstates their demands. My larger aim will be to show that there is good reason

¹ This view is considered and rejected in Pogge (2007: 19-20). I will discuss the other possibilities mentioned in this paragraph in Section 2.

to think that Pogge's strategy does indeed pay off, and that global poverty actually does engage the negative duties of seemingly unconnected individuals around the world, albeit to a lesser extent than Pogge claims. I will begin, in Section 1, by summarizing the elements of Pogge's argument that are directly related to what I see as the gap in his analysis. In Section 2, I will attempt to pinpoint this gap by identifying an ambiguity in Pogge's formulation of the supposedly negative duties engaged by global poverty. I will argue that on only one of two possible readings are these duties truly negative, and I will defend the view that it makes sense to care about this distinction from a variety of objections to Pogge's negative duty approach. In Section 3, I will argue that the ambiguity in Pogge's formulation of the negative duties engaged by global poverty leads his own analysis to shift illicitly between negative and positive duties, and, in Section 4, I will consider how his approach might be pursued in a way that avoids this shift. Although I will not defend a fully worked out account of the actual negative duties owed by typical citizens of affluent nations, I will attempt to show that my analysis allows us to draw a meaningful distinction between the relevant positive and negative duties and I will indicate what needs to be settled in order to determine what the negative duties demand. In the process of doing this, I will illustrate some of the ways in which Pogge's own account of these negative duties is overly broad. If my overall argument is successful, it will pave the way for a Pogge-inspired exploration of the full set of genuinely negative duties engaged by global poverty, which, as Pogge points out, is a project that has both theoretical and practical merits.

1. Pogge's View

How does Pogge attempt to show that global poverty engages negative duties, even of people whose lives seem unconnected to those who are impoverished? The key, as he sees it, is to recognize the role the global institutional structure plays in generating global poverty and maintaining its persistence. Once one sees that the global order actually harms the global poor, on whom it is imposed, one will be forced to conclude that supporting, participating in and benefiting from this global order involves a violation of one's negative duties not to harm others. Although this is a negative duty, Pogge points out that it requires positive action,

in particular positive action either to compensate for the harms imposed by the global order or, more importantly in Pogge's view, to work towards reforms that would prevent the global order from continuing to impose harm.²

As should be clear, the force of Pogge's analysis hinges on the question of whether the global order actually does harm the poor. Moreover, as Pogge recognizes, harm is a comparative concept, and we therefore need a baseline for comparison in order to substantiate harm claims. In his discussion of possible baselines, Pogge acknowledges that harm is often understood historically, and that this understanding of harm requires justifying harm claims by showing either that the people harmed are worse off than they previously were or else worse off than they would have been without the harmful event or action. Pogge argues that both of these versions of a historical baseline are inadequate for assessing the possibility of harm done by the current global order.³ The problem with comparisons to previous states of affairs is that it is quite possible for someone's situation to be improving even if she is still being harmed. As Pogge points out, it is surely true that the Jim Crow laws in place after the Civil War in the U.S. were genuinely harmful to African Americans, even if it was far better for African Americans to live under those laws than to remain enslaved (Pogge 2007: 40). If we attempt to avoid this problem by drawing comparisons to a more distant historical point prior to any possibly harmful interaction, or to a hypothetical state of nature, Pogge contends that we end up being unable to reach any meaningful conclusions because we have no way to make reliable judgments about how things would have turned out given a history far different from the actual one, or that we have no non-arbitrary way of settling on a particular description of life in the state of nature.

These considerations lead Pogge to adopt a different conceptual approach to questions of harm. Rather than supposing that we can begin with an analysis of harm and then draw conclusions about justice from premises about what is and is not harmful, he suggests that we instead begin with a harm-independent account

² Following Pogge, I will focus my discussion on reforms, but that is not meant to deny Pogge's assertion that in some cases the negative duties in question can (and perhaps can only) be discharged through compensation instead.

³ I am drawing primarily on Pogge (2004, 2007, 2010a, 2010b). Pogge (2005a) expresses a slightly different formulation of Pogge's view, in which he supposes that baselines of this sort may be legitimate but attempts to show that they lead to the same conclusion as the baseline he prefers in Pogge (2004, 2007, 2010a, 2010b).

of justice and then conclude that the imposition of the global order harms the poor if the global order being imposed is itself unjust (see e.g., Pogge 2004: 274). Pogge goes on to adopt what he sees as a minimal conception of the demands of justice.⁴ The global order is unjust, he claims, if it foreseeably gives rise to human rights deficits that are reasonably avoidable, which is to say that there is an alternative global order that would foreseeably avoid these human rights deficits without generating other comparably serious problems. Insofar as one imposes an unjust global order, one is therefore harming those whose human rights are unfulfilled under this global order (Pogge 2005a: 45, 2005b: 60-61, 2007: 30, 2010b: 196).

One important element of this analysis of harm is that it focuses on what Pogge calls institutional as opposed to interactional duties. As Pogge puts it:

The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights. I would be violating this duty if, through my participation, I helped sustain a social order in which such access is not secure. (Pogge 2008: 72)

In terms of poverty, Pogge's line of thought is that the normative force of others' poverty is that one must not help uphold and impose coercive institutions under which others lack secure access to the means of subsistence, which access Pogge takes to be a basic human right. This obligation is, according to Pogge, the specification of a negative institutional duty. It is negative, on his view, because it is a duty not to support or participate in certain institutions, and it remains a negative duty even though it can in many cases generate a demand for positive actions.

2. Negative and Positive Institutional Duties

Given that Pogge's overall aim is to demonstrate that the obligation to respond to global poverty stems from negative duties, and therefore cannot be dismissed or

⁴ It is important to recognize that Pogge does not deny that the demands of justice might go beyond this minimal conception. Rather, his claim is that any reasonable account of the demands

downplayed by those who reject positive duties or see them as substantially less stringent than negative ones, it is crucial for his analysis that the institutional duty he focuses on really be a negative one. But I will shortly argue that the way Pogge has formulated the duty in question is actually ambiguous between two readings, under only one of which the duty is properly seen as negative.⁵ In Sections 3 and 4, I will then argue that attention to this ambiguity reveals a flaw in Pogge's analysis that leads him to overstate what the relevant negative duties demand.

First, though, let me say more about why I follow Pogge's lead in taking a possible distinction between negative and positive duties to be significant, in spite of the fact that many critics have objected to this element of Pogge's view. In some cases, the objections are narrowly tailored to the negative institutional duties involved in Pogge's argument, and I will discuss several such objections later in this section, once I have identified those duties more precisely. In other cases, though, the objection is targeted more broadly at the general idea that negative duties not to cause great harm are any more stringent than positive duties to prevent such harm. Joshua Cohen (2010: 28-30) provides one of the more forceful expressions of this sort of objection, insisting that if someone is suffering severely and another has the ability to end this suffering at relatively little cost, that is enough to support the conclusion that the latter has an obligation to act. Refusal to help, Cohen claims, warrants moral condemnation, and worrying about whether the latter has somehow caused or contributed to the former's suffering, and therefore has violated a negative duty, is a "theological distraction from a moral disgrace" (Cohen 2010: 29). Debra Satz (2005: 52-54) raises similar concerns, expressing the worry that Pogge is misguided in his treatment of positive duties to assist the global poor as less stringent than negative ones not to contribute to their suffering.⁶

of justice will include at least this much.

⁵ I believe Patten (2005) was the first to raise an objection of this sort against Pogge's analysis, and it has since been echoed by Gilabert (2004) (who acknowledges being influenced by Patten's pre-publication presentation of his paper), Mieth (2008), Tan (2010), and Barry and Øverland (forthcoming). Barry and Øverland's discussion of the issue has the most in common with mine, in which I will attempt to identify precisely where and how Pogge makes the shift from negative to positive duties, with the aim of showing how his analysis can be revised to avoid this shift and thereby yield substantial conclusions about genuinely negative duties to the poor.

⁶ For extended arguments aimed at defending the stringency of extensive positive duties to the global poor, thereby providing potential support for Cohen and Satz, see Singer (1972), Shue (1980), and Unger (1999).

Having faced this sort of objection repeatedly, Pogge has developed a pair of responses, one practical and one theoretical, which I take to be effective. In his reply to Cohen, Pogge (2010b: 178-179) emphasizes the practical response, pointing out that many otherwise decent and reasonably moral or virtuous people have well-developed psychological mechanisms that lead them to ignore positive duty arguments aimed at motivating them to avoid moral disgrace. In contrast, Pogge contends that negative duty arguments are more likely to be motivationally efficacious, given the natural tendency to see oneself as more responsible for what one causes than what one fails to prevent.⁷ In the context of this practical response, it doesn't matter whether positive duties to assist the global poor are every bit as stringent as negative duties not to cause poverty. But Pogge has also argued that there really is a morally significant difference between negative and positive duties, provided that what is at stake is the same. This argument is explicit in his reply to Satz:

I do deny that positive duties are as stringent as their negative counterparts (holding constant what is at stake for all concerned). I deny, for instance, that an affluent person who, in order to save \$80, declines to sponsor a child in Mali with the predictable result that this child dies is acting as wrongly as another affluent person who kills such a child for an \$80 benefit (Pogge 2005b: 76).

To my mind, both of Pogge's responses here are compelling. This is admittedly controversial, and I don't take Pogge to have settled the issue definitively, but I do think his responses are at least sufficient to justify taking the distinction between negative and positive duties seriously and investigating the extent of genuinely negative duties owed to the global poor.⁸

⁷ For discussion of this phenomenon, see Scheffler (2001: 32-47). Scheffler raises some concerns about the appropriateness of this tendency, but also argues that it has such powerful phenomenological roots that we are unlikely to be able to overcome it. Later in this section I will consider concerns raised by Mieth (2008) and Lichtenberg (2010) about whether the negative institutional duties that are the focal point of Pogge's analysis are as motivationally efficacious as traditional negative duties.

⁸ Notice that even those who are committed to denying a fundamental distinction between acts and omissions typically either "argue back" to a derived distinction (as Scheffler (2001: 35) puts it) or see themselves as owing an explanation for why so many find the distinction intuitively plausible. The former is sufficient to underwrite Pogge's theoretical response, and the latter demonstrates the power of his practical response.

Recall that Pogge's analysis focuses on a negative institutional duty not to participate in and benefit from institutions that foreseeably and avoidably lead to human rights deficits. To see why I believe his formulation of this duty to be ambiguous, consider the difference between killing and failing to rescue. This is a paradigm case of negative and positive duties, one that Pogge appeals to in articulating the distinction (Pogge 2008: 136). Given that what is at stake in either case is the same, namely another's life, and provided that we accept the distinction between negative and positive duties as morally relevant, the negative duty not to kill is more stringent than the positive duty to rescue.

Now what happens if we transform these familiar duties into an institutional context? In other words, I want to consider four distinct duties:

- (1) Don't kill.
- (2) Rescue.
- (3) Don't participate in institutions that kill.
- (4) Don't participate in institutions that fail to rescue.

(1) and (2) I am taking as paradigmatically negative and positive, respectively. What about (3) and (4)? At first glance, they may both seem to be negative. Both, after all, tell us not to perform a well-defined set of actions: participation in certain institutions. If we think that negative duties identify specific things that we are (negatively) obligated not to do, whereas positive duties identify specific things that we are (positively) obligated to do, then it looks as though (1), (3) and (4) are all negative duties, whereas (2) is positive.

Notice, though, that if we call (3) and (4) both negative, we can no longer maintain that negative duties are more stringent than positive duties, even when what is at stake is held constant. In terms of weightiness or stringency, I would contend that (2) and (4) are equivalent, or at least roughly equivalent. This is because (4) derives its force from (2), whereas (3) derives its force from (1). If one is not persuaded that it is particularly important to rescue people, one will conclude that participating in institutions that fail to rescue people is similarly inconsequential. To put it another way, if one thinks it is more important not to kill people than to rescue them, one will conclude that it is also more important

not to participate in institutions that kill than not to participate in institutions that fail to rescue.⁹

As I see it, there is a terminological choice here.¹⁰ We can call (4) negative on the grounds that it forbids us from performing certain actions, or we can call (4) positive on the grounds that its stringency is derived from and comparable to (2), which means that it has the force of a paradigmatically positive duty. Pogge explicitly states that he wants to interpret the distinction between negative and positive duties in such a way as to preserve the moral significance of the distinction, which suggests that he should identify (4) as positive (Pogge 2008: 136). Regardless of how we want to use the terms, though, what really matters is the stringency of the duties in question. To highlight that, I will adopt the usage to which I think Pogge is committed, and call (3) negative and (4) positive, although the substance of my argument does not depend on this terminological choice.

Turning back to the duty at stake in Pogge's argument about global poverty, we can now see that it is open to two importantly different readings. Pogge could be asserting either:

(5) Don't participate in institutions that generate global poverty.

or (6) Don't participate in institutions that fail to prevent global poverty.

Both (5) and (6) are institutional duties, but there is nonetheless an important difference between the two: (5) asserts a negative institutional duty, whereas (6) asserts a positive one. This means that if Pogge is to stay true to the task of eschewing reliance on positive duties, he must demonstrate that typical citizens of relatively affluent countries are violating (5) and not merely (6). This is particularly important to notice given that Pogge's own formulation of the duty in

⁹ This argument is meant to show that that once we draw a significant distinction in stringency between (1) and (2), we have good reasons to draw a similar distinction between the stringency of (3) and (4). Although this is meant to suggest that (1) and (3) are both more stringent than (2) and (4), that has not yet been established. It is possible that the shift from direct obligations to institutional obligations degrades stringency to such an extent that even if (1) is more stringent than (2), and (3) derives its stringency from (1), (3) may be no more stringent than (2). This possibility is related to objections against Pogge's focus on negative institutional duties that are raised by Mieth (2008), Lichtenberg (2010), Schaber (2011) and Barry and Øverland (forthcoming). I will address their objections later in this section.

¹⁰ The terminology I endorse in this paragraph is fairly standard. It coheres well, for instance, with that adopted by Gilibert (2006: 194) and Ashford (2007: 187).

question, with reference to “institutions under which [people] do not have secure access to the objects of their human rights,” is ambiguous between (5) and (6), and may even lend itself more to being read as (6) than (5) (Pogge 2008: 72, quoted earlier).

To some extent, Pogge recognizes the possibility of this sort of distinction. In developing his account of institutional duties, he identifies six ways in which institutions can be related to deficits in human flourishing or human rights.¹¹ In the first four, the deficit is either “officially mandated,” “legally authorized,” “foreseeably and avoidably engendered,” or “legally prohibited but barely deterred.” In the final two, the deficit is the result of institutions “avoidably leaving unmitigated the effects of a natural defect” or “avoidably leaving unmitigated the effects of a self-caused defect.”¹² Pogge is interested in the extent to which support of institutions in these various categories constitutes a core injustice, or a violation of one’s negative institutional duties, and he acknowledges that in the final two cases there may not be any such violation at all. He doesn’t elaborate on this point, but I think it is natural to see this as a recognition of the distinction between negative and positive institutional duties. After all, institutions that avoidably leave undesirable effects unmitigated are clearly ones that fail to prevent those effects rather than generate them, and I suspect that is what causes Pogge to express reservations about the final two cases.

What Pogge fails to recognize, however, is that his category of foreseeably and avoidably engendered deficits, which is the one he adopts systematically, fails to distinguish positive from negative institutional duties. Notice, for instance, that if an institution avoidably leaves the effects of a natural or self-caused defect unmitigated, and provided that this is an expected consequence of that institution, one could also accuse such an institution of foreseeably and avoiding engendering those effects. Perhaps one could resist this move by insisting on a restrictive reading of “engendering,” and that is certainly consistent with what Pogge says in his direct discussion of these six categories. But that is not the way Pogge’s analysis typically proceeds. Instead, as indicated in Section 1, Pogge consistently focuses on the foreseeable avoidability of severe poverty and other human rights

¹¹ This occurs at Pogge (2008: 47-49). Thanks to Christian Barry for calling my attention to this passage.

deficits, and this is cashed out in terms of the possibility of a reasonable alternative set of institutions under which such poverty or human rights deficits occur to a lesser extent (or not at all). This approach precludes an emphasis on “engendering,” and thereby obscures the distinction between (5) and (6).

In Sections 3 and 4, I will explore the significance of this distinction for Pogge’s analysis of institutional duties, but first let me address several additional concerns about whether it matters that Pogge fails to confine himself to genuinely negative institutional duties, and, more generally, about whether it makes sense to follow his lead and develop an analysis of global poverty that focuses on such duties. One important worry is that even if there is a significant moral distinction between straightforward negative and positive duties, this distinction may vanish in the case of the negative institutional duties of the sort relevant to Pogge’s analysis. In other words, the idea is that even if we concede that (1) is more stringent than (2), we might nonetheless deny that there is any important difference between (3) and (2), or, more importantly, between (5) and (6). Corinna Mieth (2008) presses this objection against Pogge, arguing that traditional negative duties enjoy greater stringency largely in virtue of the fact that, in contrast to traditional positive duties, they require only that one avoid certain well-defined actions, and are therefore less restrictive of individual liberty.¹³ But, Mieth contends, Pogge’s negative institutional duties do not fit this description. As a result, even though she is persuaded by his claim that the global order imposed by the affluent generates foreseeable and avoidable suffering, she concludes:

[I]t makes no sense to consider these effects as a violation of a negative duty. This is so because negative duties in any familiar version imply that they can be fulfilled by simple forbearance. And this is not true for Pogge’s negative duty. So it makes more sense to refer to the content of

¹² The phrases used to describe each of these six categories are Pogge’s.

¹³ Mieth lists some additional features of traditional negative duties, but I take it that her analysis ultimately focuses on this question of demandingness. See Mieth (2008: 24-25). One issue that Mieth mentions, but does not seem to place much weight on, is the fact that traditional negative duties are perfect in the sense that they generate determinate demands, whereas Pogge’s negative institutional duties are imperfect. Ashford (2007) does an excellent job of explaining why the imperfect nature of Pogge’s negative institutional duties does not imply that they are less stringent (or less negative) than traditional negative duties.

negative duty generated positive obligations directly as positive duties (Mieth 2008: 34).

Lichtenberg (2010) offers a similar line of objection. She characterizes Pogge's negative institutional duties as among the "new harms," which are distinct from traditional harms in that they result from obscure causal mechanisms triggered by everyday activities, making them difficult to notice and challenging to avoid once noticed. Lichtenberg concedes that there is at least one reason for thinking that negative duties to avoid the new harms are more stringent than positive duties of assistance, namely that having done something to put someone in a position of desperate need always adds at least something to the obligation to address that need.¹⁴ Nonetheless, she argues that the primary difference between traditional negative and positive duties lies in their demandingness, and that, in terms of demandingness, negative duties not to commit the new harms are on a par with positive duties.¹⁵ As a result, Lichtenberg effectively poses a dilemma for arguments like Pogge's that are focused on the new harms. If the arguments work, she claims, people will come to realize that their negative institutional duties are just as demanding as traditional positive duties, and they will no longer take them seriously even though they are "negative." If the arguments don't work, then the idea that negative duties are more important than positive ones will persist, but people will not see global poverty as engaging their negative duties.

Although I think Mieth and Lichtenberg raise an important concern here, I am not convinced that it undermines the significance of the distinction between negative institutional duties and positive duties. I concede that some will no doubt balk at arguments like Pogge's in precisely the way Mieth and Lichtenberg predict, insisting that they can disregard the sort of duties Pogge discusses in the

¹⁴ Here Lichtenberg is conceding the point encapsulated in Pogge's example about the child in Mali.

¹⁵ Lichtenberg (2010: 563-567) also argues that there is at least some reason to see positive duties of assistance as more significant than Pogge's negative institutional duties because attempting to provide aid is more effective at combating the suffering associated with severe poverty than attempting to avoid harm. But she acknowledges that this is an empirical claim, and that her evidence for it is tentative at best. Moreover, I find it unclear that her tentative conclusion in favor of the efficacy of aiding over not harming follows from the considerations she discusses, and it is also not clear that she adequately considers the claims Pogge has defended about the importance of even relatively minor changes in the global structure. More importantly, I think the question of efficacy is less significant than Lichtenberg suggests. The negative duties Pogge defends involve obligations not to harm or to compensate those harmed. If it turns out that aiding is far more

same way that they disregard purported positive duties. Moreover, I think that Pogge's failure to distinguish clearly between the negative institutional duties of (5) and the positive institutional duties of (6) facilitates this sort of response. But I would also contend that genuinely negative institutional duties are able to engage with a legitimate distinction between one's responsibility for the things that one brings about, or helps to bring about, and those that one fails to prevent.¹⁶

What really matters, though, is not whether the distinction actually is legitimate, but whether it is perceived as such, and whether this perception is entirely contingent on the lesser demands imposed by negative obligations.¹⁷ In my view, it is reasonable to expect that, for many people, becoming convinced that they are contributing to severe poverty will motivate them more powerfully than becoming convinced that they can do something to alleviate such poverty. The degree to which avoiding or compensating for such contribution is demanding will no doubt lessen the effectiveness of that motivation, but, I contend, not to the same degree that similar levels of demandingness degrade the motivation to provide assistance. Admittedly, adopting Pogge's approach involves trading off philosophical burdens for empirical ones. It is, after all, easier to resist the claim that one is contributing to severe poverty than the claim that one could do something to alleviate such poverty. But, as Pogge points out, it is also far easier to be stubborn about moral intuitions, such as the view that positive duties are relatively insignificant, than to be stubborn about empirical intuitions, such as the view that one's behavior does not contribute to global poverty.¹⁸ As a result, if one can make a compelling case that severe poverty actually does engage negative duties, it is not unreasonable to think that this

effective than avoiding harm, that suggests veering in the direction of compensation, not that the negative duty in question is less stringent than it would otherwise be.

¹⁶ Lichtenberg (2010: 569-571) appears to resist this claim in the context of her discussion of Williams (1973). But I believe her analysis is fully compatible with what I am asserting here. She insists that it is a mistake to suppose one's special responsibility for what one does entails a complete lack of responsibility for what one fails to prevent. She further suggests that we cache out these sets of responsibilities similarly, so that the responsibility not to inflict the new harms is understood as a responsibility to do one's share to avoid harm, and the responsibility to provide assistance is similarly understood as a responsibility to do one's share to assist. That all seems plausible (although, for an alternative view see Pogge (2005b: 80-83), but it is also consistent with the view that there is a more stringent obligation to do one's share to avoid harm than to do one's share to provide assistance. Lichtenberg seems to take her analysis to deny this latter claim, or at least count against it, but I reject that assessment.

¹⁷ For discussion of the perception of this distinction, see again Scheffler (2001: 32-47).

¹⁸ See Pogge (2008: 31-32). The point, as I see it, is that particular moral intuitions are generally granted greater epistemic authority than particular empirical ones, and perhaps rightly so.

argument has the potential to motivate reform even from some (perhaps many) of those who deny extensive and stringent duties of assistance. This is the thought that led Pogge to develop his negative institutional duty argument, and it is one that I think justifies continuing to pursue such an approach, in spite of the concerns raised by Mieth and Lichtenberg.

Another possible objection, or set of objections, to Pogge's approach stems from Iris Marion Young (2011), who argues that rather than worry about violation of specific negative duties we should instead focus on structural injustice. This leads her to endorse what she calls a social connection model of responsibility, in contrast to traditional liability models. The key, as she sees it, is that people contribute to injustice "indirectly, collectively, and cumulatively through the production of structural constraints on the actions of many and privileged opportunities for some." As a result, she concludes that "all those who contribute by their actions to structural processes with some unjust outcomes share responsibility for the injustice" (Young 2011: 96). At first glance, this looks like an endorsement of Pogge's shift from interactional duties to institutional duties.¹⁹ But Young takes Pogge to be committed to a liability model of responsibility, which she distinguishes from her preferred approach in five ways.²⁰ First, Young contends that the liability model inappropriately isolates responsibility on specific perpetrators, thereby absolving all others of any responsibility. It also, second, overlooks the importance of background conditions, or social structures, against which individual actions are performed, and, third, is committed to a backward-looking emphasis on assigning responsibility for prior harms rather than a forward-looking emphasis on eliminating injustice. Fourth, the liability model fails to recognize the extent to which responsibility for injustice is essentially shared, which is to say that it inappropriately attempts to assign different levels of responsibility to different agents. Finally, the liability model fails to recognize that the responsibility to eliminate injustice requires collective action.

The problem with Young's analysis, as an objection to Pogge, is that, insofar as Young identifies genuine flaws in the liability model, Pogge's view

¹⁹ Pogge describes his idea of our core institutional duty as requiring that we "work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights" (Pogge 2008: 71). Moreover, in spite of Young's suggestion to the contrary, he construes this idea of institutional order and public culture broadly (Young 2011: 141-142, Pogge 2008: 65-73).

²⁰ The next several sentences summarize Young (2010: 105-113).

avoids them.²¹ To begin with, by virtue of the shift from interactional to institutional duties, Pogge is able to argue, and does, that violation of negative duties is widespread, and not isolated to a single or small group of perpetrators. He also, as a result of this shift, explicitly directs a great deal of attention to background conditions.²² In addition, Pogge's analysis is clearly not confined to a backward-looking focus, as is evident in his strong emphasis on institutional reform aimed at eliminating harm in the future.²³ Pogge's analysis in terms of negative institutional duties is also fully compatible with Young's insistence on the need for collective action. He certainly does not think, as Young seems to suggest, that in order for individuals to be in violation of their negative institutional duties they must be capable of reforming the relevant institutions on their own. With respect to the idea of shared responsibility, insofar as this is distinct from the point about isolation, Young's assertion is implausibly strong. Her claim is that all agents involved in a structural injustice bear the same kind and degree of responsibility for that injustice.²⁴ As Nussbaum (2011) points out, this claim is belied by Young's own efforts to provide parameters for reasoning about ways of remedying injustice.²⁵

Young also offers a further objection to a negative institutional duty analysis of global poverty, this time focused on the idea of blame, which she argues is conceptually tied to responsibility in the liability model (Young 2011: 97). She is concerned that assigning blame is counterproductive, because it typically leads to defensiveness and blame-shifting, and sometimes also to a

²¹ It is important to recognize that Young is not primarily discussing and objecting to Pogge's view, but rather resisting a general approach to issues of justice and responsibility, which she takes to include his.

²² For an example of this, see Pogge's discussion of slavery and Jim Crow laws summarized in Section 1. Young's concerns with respect to background conditions include both the idea that the liability model ignores important structural contributors to justice or injustice and the claim that it is committed to treating the status quo as morally neutral. Pogge's discussion of Jim Crow laws shows that he avoids both of these pitfalls.

²³ Pogge writes, "we should think not only about such remedial measures, but also about how the injustice of the global order might be diminished through institutional reforms that would end the need for such remedial measures" (Pogge 2008: 30), and he expends far more energy and ink working out and promoting reforms than remediation. For an extended rebuttal of an earlier version of Young's claim that Pogge is working under a liability model that commits him to a backward-looking emphasis, see Barry (2005: 112-117).

²⁴ This is most explicit at Young (2010: 124).

²⁵ See Young (2010: 142-147) for a discussion of these parameters. There she suggests that, among other things, the degree to which one has the power or ability to alleviate a particular injustice and the degree to which one has benefitted from that injustice both affect the level of responsibility one has. Interestingly, Pogge (2005b: 80) and Ashford (2007: 200) both briefly list similar considerations.

narcissistic emphasis on one's own moral status (Young 2011: 117-8).²⁶ This leads her to the radical conclusion that we should reject blame entirely, both for having contributed to structural injustice and for failing to remedy such injustice (2011: 143). Barry (2005) and Nussbaum (2011) both raise what I take to be legitimate worries about the coherence of that move, but rather than pursuing those let me instead point out that Young appears to have saddled herself with a false dilemma. The choice appears to be: either assign blame to precisely the same degree that one assigns responsibility, which will lead to a great deal of blaming on a view that recognizes extensive structural injustice as both Pogge and Young do, or else give up blame altogether. Pogge's own view is compatible with an appealing middle ground, which involves rejecting the idea that blame correlates perfectly with wrongdoing, yet insisting that those who violate negative institutional duties appropriately bear some blame for the harms that result.²⁷ This approach holds out the hope of avoiding the counter-productive consequences of focusing excessively or exclusively on blame, while also harnessing the motivational power that can come from inciting people to recognize their blameworthiness.²⁸

According to yet another line of objection, pressed by Ser-Min Shei (2005), the problem with following Pogge's focus on negative institutional duties is that violation of such duties does not, itself, constitute harm. In developing this objection, Shei draws a distinction between harms that result from individual actions in isolation and harms that result only from a collection of actions, so that a particular individual makes no noticeable marginal difference to the harm caused. He then argues that in order to count as harming another in a morally problematic way, one must either (a) make a marginal difference in the degree of harm that the other suffers, (b) participate in a collective harm with the aim of causing the harm, or (c) participate in a collective harm in which one is morally responsible for the actions of the other agents with whom one collectively causes the harm. If this is correct, then negative institutional duties like (5) are underspecified. Violation of (5) will only count as a harm if one makes a marginal contribution, acts with the aim of harming, or is responsible for many

²⁶ Lichtenberg (2010: 577) also expresses some of these concerns.

²⁷ See Pogge (2008: n 82, n 102) for some suggestive remarks. This is also the position adopted explicitly by Ashford (2007: 192-193) and implied by Nussbaum (2011).

others' behavior. As Shei points out, typical citizens of affluent nations, whom Pogge wants to charge with harming the global poor through violation of negative institutional duties, do not meet any of these criteria.

The problem with Shei's analysis, as I see it, is that his criteria for the commission of morally problematic harm, and thus the violation of a negative duty, are too restrictive. This point is made with exceptional clarity by Elizabeth Ashford (2007: 195-197) in her discussion of additive harms. She uses a variety of "harmless torturers" examples inspired by Derek Parfit (1984: 80-83), in which a large group of torturers each administer small shocks spread out over a range of victims in such a way that no one torturer can be said to make a marginal contribution to the pain of any of the victims, but the victims nonetheless experience agonizing pain. As she points out, even if we further assume that the torturers do not aim at their victims' pain, and even if none of the individual torturers are morally responsible for the behavior of the other torturers, it is intuitively clear that each torturer is committing morally problematic harm and is violating a negative duty not to inflict pain.²⁹ As this shows, failure to make a marginal contribution, failure to take the harm as a reason for one's action, and lack of control over the behavior of the others in the group that produce the harm, even taken in conjunction, are not enough to preclude an agent from violating a negative duty.

Perhaps, though, the real worry here is that violation of a negative institutional duty only constitutes the enabling of harm, which could make such duties significantly weaker than direct negative duties not to inflict harm, perhaps even no more stringent than positive duties of assistance. Schaber (2011) raises a version of this objection that is framed in terms of an analogy to the difference between providing someone with a knife that is used for stabbing another person and actually stabbing that other person. The idea is that the former enables harm, whereas the latter causes harm directly. As Schaber sees it, the enabling of harm

²⁸ For a helpful, although brief, discussion of the ways in which blame can be productive, see Nussbaum (2011: xxiv-xxv).

²⁹ For a more detailed presentation of the case, which perhaps makes the point more convincing, see Ashford (2007). Shei (2005) also briefly discusses a version of this sort of case, but implausibly suggests that the torturers are only violating negative duties not to harm if they have deliberately set up the "harmless torture" scheme. He does at one point mention that it might matter whether the torturers know that they are causing pain, which I take to be a more plausible consideration, but any emphasis on knowledge of the effects of one's actions drops out of Shei's

in some cases constitutes a significant moral wrongdoing, but not in all cases. He focuses on a pair of examples, one in which a company produces knives with the knowledge that some will be used to kill people, and another in which a person lends a knife to his neighbor with the knowledge (or strong suspicion) that the neighbor will use the knife to kill someone. The former case he identifies as an instance of morally permissible enabling, and the latter as morally impermissible enabling. According to Schaber, the distinction between these cases lies in the differential costs associated with avoidance of the enabling behavior. The cost of giving up knife production, both for the knife producer and for all legitimate knife users, would be quite high, whereas (by hypothesis) the cost of not lending the knife to one's neighbor would be negligible. Schaber reinforces this point by calling attention to a modified version of the first example. He imagines a case in which the knife producer could easily, at little cost, switch to the production of knives that would have all of their normal functions but could not be used to kill people, with the idea being that in such a case the knife producer would have an obligation to make the switch.

Barry and Øverland (forthcoming) develop this line of thought in detail, through a careful examination of different forms of enabling. Ultimately, like Schaber, they conclude that violations of negative institutional duties related to global poverty are typically instances of enabling harm to the poor rather than directly harming them. They then argue that the stringency of a duty not to enable harm depends on the extent to which the agent knows, or should know, that her action enables harm. And they concur with Schaber's claim that the cost of not enabling is also an important factor in determining the stringency of a duty not to enable.³⁰

The upshot of Barry and Øverland's analysis is that if one knows, or should know, about the harm enabled by one's actions, and if the cost of avoidance of the enabling behavior is low (relative to the magnitude of harm enabled), then there is a stringent obligation not to enable the harm.³¹ This

ultimate analysis. I will discuss the significance of such knowledge shortly, in the context of a different line of objection that focuses on it directly.

³⁰ I do not mean to suggest that Schaber denies the importance of the knowledge condition, but he does not emphasize it in the way Barry and Øverland do.

³¹ With respect to the issue of what is known, or should be known, I think it is important to recognize that a large part of Pogge's overall project is to help people gain knowledge of the harms they are enabling, and the fact that there are relatively low-cost alternatives to enabling this harm. See, for instance, Pogge (2010a: 1-3, 2005b: 82-83).

obligation is, on their view, less stringent than a traditional negative obligation not to harm directly. But, and more importantly for my purposes, it is more stringent than a duty to provide assistance. In other words, the cost that must be borne in order to avoid directly inflicting a harm are greater than the costs that must be borne in order to avoid foreseeably enabling that same harm, which are in turn greater than the costs that must be borne in order to prevent the harm. Moreover, even those who are inclined to downplay the significance of obligations to prevent harm, on the grounds that it is not their responsibility to provide assistance, cannot use similar strategies for evading the obligation to avoid foreseeably enabling harm.³² As a result, although I think the distinction between enabling harm and directly harming is an important one, I also think it is appropriate to characterize the institutional duties at the heart of Pogge's analysis as "negative." This highlights their greater stringency and wider acceptance than positive duties.

I will consider one final worry about Pogge's restriction to negative duties, which is that the fulfillment of negative duties alone, including duties not to harm directly and not to enable harm, will not be enough to realize justice or eliminate global poverty. This is, for instance, what Mieth identifies as her own chief concern with Pogge's negative institutional duty approach. She wants to ensure access to the means of subsistence for all, even those who, as she puts it, lack such access "in the first place," or independently of any potentially harmful actions on the part of others (Mieth 2008: 30). Her central positive argument, and her core objection to Pogge, is that ensuring subsistence for all, which she sees as a demand of justice, requires both positive and negative duties.³³ Ashford (2007) and Pablo Gilabert (2004) each argue for similar conclusions. Although Ashford is far more sympathetic than Mieth to Pogge's analysis of negative institutional duties, she nonetheless insists that such duties are insufficient to ensure fulfillment of basic human rights. Achieving that goal, she claims, requires that certain positive duties be recognized as enforceable demands of justice. Likewise, Gilabert argues that positive duties are required to generate obligations to eradicate poverty, especially instances of poverty that result from natural

³² Let me emphasize that I am not endorsing objections against the legitimacy of positive duties of assistance, but instead identifying the difference between positive duty arguments and negative institutional duty arguments. The latter, I am claiming, have broader philosophical reach.

³³ She writes, "[A]nd this is my point against Pogge – positive duties are also absolutely necessary to guarantee the fulfillment of positive human rights" (Mieth 2008: 32 n26).

disasters.³⁴ As he puts it, “there is only so much juice to be extracted from the fruit of the negative duties conception” (Gilbert 2004: 544).

I am sympathetic to this line of analysis, although I think it is also important to recognize that arguments for enforceable positive duties of assistance to the global poor are likely to be met with greater philosophical resistance than Pogge-style arguments grounded in negative institutional duties.³⁵ In addition, I would insist that arguments for enforceable positive duties are compatible with the view that such duties are less stringent than their negative counterparts, including negative institutional counterparts.³⁶ As long as this is recognized, I see my analysis as complementing, rather than competing with, arguments that defend the existence of positive duties of justice to the global poor. Moreover, if I am correct that a Pogge-inspired emphasis on negative duties is less productive than Pogge suggests, in the sense that even though there are substantial negative institutional duties with respect to global poverty they are less extensive than Pogge believes, that increases the significance of arguments for duties that extend beyond the genuinely negative ones. Such arguments cannot, in my view, replace Pogge-style arguments grounded in negative institutional duties, because the negative duties really are more stringent, and more widely accepted, but I believe the two can, and should, co-exist.

3. Implications for Pogge’s Analysis

As indicated earlier, Pogge’s view is that the global order counts as unjust, and therefore harmful, as long as there is a reasonable alternative institutional structure under which global poverty would foreseeably be reduced or

³⁴ Gilbert (2006) further defends the idea that certain positive duties are properly understood as enforceable demands of justice.

³⁵ As indicated earlier, Pogge’s approach trades the philosophical burden of defending the legitimacy of positive duties for the empirical burden of demonstrating harm, or at least that is the trade-off made if the approach actually is restricted to negative institutional duties.

³⁶ Gilbert explicitly recognizes this when, in the midst of his argument for enforceable positive duties, he acknowledges “negative duties regarding a certain object of human rights are normatively stronger than positive duties regarding the same object” (Gilbert 2004: 545). Later he reaffirms that his view “does not conflict with the thesis that negative duties are more stringent than positive ones” (Gilbert 2004: 547). Ashford (2007), as far as I can tell, is neutral on this point. She is careful to keep her endorsement of negative institutional duties separate from her argument for positive duties of assistance, which suggests that she acknowledges the greater stringency of the former, but she never commits herself explicitly.

eliminated.³⁷ But demonstration of an available alternative is enough to show that those participating in the current system are violating the positive institutional duties reflected in (6), not that they are violating the negative ones reflected in (5). That requires a further claim, which is that the current global order is actually generating poverty rather than merely failing to prevent it.³⁸

Perhaps a stylized example will help make this point clear.³⁹ Suppose that there are two isolated societies. Call their citizens As and Bs. The As, we can imagine, are fairly affluent, and the Bs are not. Many of the Bs are impoverished and have life conditions comparable to the global poor in the real world. Suppose the As and Bs then begin to interact and develop rules of trade and other elements of an inter-social order. Suppose that given the As' relative wealth they effectively dictate the terms of the inter-social order. Some time passes, and some of the Bs remain in poverty. Let us also suppose that we can imagine an alternative inter-social order that would foreseeably have led to the eradication or virtual eradication of poverty among the Bs with relatively low costs.

Now let us ask what conclusions we can draw about the As' duties towards the Bs, particularly those of the Bs that remain in poverty. Given what has been stipulated above, we can convict the As of having participated in institutions effectively imposed on the Bs that have foreseeably failed to prevent poverty among some of the Bs, even though there were reasonable alternatives available that would have foreseeably prevented this poverty. This is surely enough to support the conclusion that the As have violated (6). But have they violated (5)? I would contend that we do not yet have enough information to answer that question. Nothing in the stylized example justifies a conclusion about whether the inter-social order imposed by the As has generated poverty. And so nothing in the

³⁷ For a response to Pogge that accepts this standard but argues that Pogge greatly overstates the extent to which there are reasonable alternatives to the current global order that would significantly reduce global poverty, see Risse (2005a, 2005b).

³⁸ I will use the phrases "generating poverty" and "contributing to poverty" as neutral between directly causing poverty and foreseeably enabling poverty.

³⁹ Barry and Øverland (forthcoming) use a similar sort of example to make a related point, although they are focused primarily on distinguishing cases in which the As directly harm the Bs from cases in which they enable harm, whereas I am emphasizing the distinction between cases in which the As either directly harm or enable harm on the one hand and cases in which they instead fail to prevent harm on the other.

example justifies a conclusion about whether the As have violated negative duties towards the Bs.⁴⁰

What sort of additional information would we need to assess whether the As have violated (5)? Suppose we stipulate that poverty among the Bs has been greatly reduced in the time during which the two societies have interacted? That alone would not be enough to exonerate the As.⁴¹ After all, the poverty reduction might be properly attributable to factors internal to the Bs' society, and it might even be true that poverty would be even less prevalent among the Bs now had the two societies not interacted at all. Similarly, a stipulation about increased poverty among the Bs would not be enough to convict the As of having violated (5). What we need instead is information about the actual (and foreseeable) effects of the inter-social order imposed by the As. Only that sort of information can serve as grounds for judging whether the As have violated (5), and so only that sort of information can justify the conclusion that the As have a negative duty to reform the inter-social order or to compensate the Bs who live in poverty.

To be clear, let me emphasize that I am not insisting that we must have conclusive evidence that the inter-social order has itself generated poverty in order to charge the As with violation of their negative duties.⁴² Rather, I am insisting that if we want to consider whether the As have violated their negative duties we need to look for evidence about whether the inter-social order has itself generated poverty among the Bs. I would even concede that a significant increase (or decrease) in poverty among the Bs that coincides with the development of the inter-social order is itself some evidence that the inter-social order is generating (or alleviating) poverty, and so to some extent such correlation can in fact be relevant to determining the status of the As' negative duties towards the impoverished Bs. But this sort of indirect evidence is relatively weak and is easily outweighed by direct evidence concerning the effects of the inter-social order.

⁴⁰ This claim is of course perfectly compatible with the view that the example provides enough information to judge the behavior of the As to be morally wrong or even appalling. But the point is that such a judgment, if made, must be based on the As violation of their positive duties towards the Bs.

⁴¹ This line of analysis is inspired by Pogge (2007: 40).

⁴² Here I am endorsing the response given in (Pogge 2010b: 201-205) to a concern raised by Chandhoke (2010). For a further discussion of evidentiary standards in this sort of context, see Barry (2005: 125-128).

In any case, the point of this example is to illustrate that Pogge needs to do more than demonstrate the availability of a reasonable alternative global order under which global poverty would foreseeably be less widespread or severe in order to sustain the conclusion that those who participate in the imposition of the current global order are violating their negative duties towards the global poor. If I am correct, he must also show that the global order itself generates poverty, or makes the situation worse than it would otherwise be. In other words, he must show that the global order harms the poor.

But now it seems that we have gone in a large circle. Recall that Pogge's suggestion was that we analyze the idea of harm in terms of justice. First find a harm-independent conception of the demands of justice, he said, and then count as harmful anything that fails to satisfy these demands. I do not think there is anything necessarily wrong with that approach to the problem, but what I have been attempting to show is that, together with his account of the demands of justice, it leads Pogge to ignore the distinction between positive and negative duties.

One might be tempted by the conclusion that the fundamental problem here is that on an institutional analysis there is no way to draw a meaningful distinction between positive and negative duties.⁴³ At times that seems as though it may be Pogge's own view, such as when he writes:

When more premature deaths occur under a system of rules than would occur under some feasible alternative, we might say that there are excess deaths under the existing regime. But how can we distinguish between those excess deaths that the existing rules *bring about* and those that these rules merely *fail to prevent*? (Pogge 2010a: 37-8)

Pogge follows this rhetorical question by considering and rejecting various ways one might attempt to draw this distinction. The ultimate lesson, as he sees it, is that we should not worry about sorting out what the rules bring about and what they fail to prevent. Instead, we should conclude that whenever an institutional structure foreseeably results in a situation in which some are in severe poverty

⁴³ As discussed in Section 2, this is what Mieth (2008) and Lichtenberg (2010) suggest.

there is a negative duty not to participate in that structure, provided there is a reasonable alternative that would foreseeably avoid or lessen the poverty.⁴⁴

The problem here is that giving up on distinguishing between what the rules bring about or enable and what they fail to prevent just is giving up on the distinction between negative and positive institutional duties. I have been attempting to show that if we think there is a distinction between negative and positive interactional duties, then we should endorse a similar distinction with respect to institutional duties. Once we shift away from stylized cases such as the one involving the As and the Bs it may be difficult to draw the distinction with confidence, but that difficulty does not itself lessen the importance of the distinction. Of course, one could argue for independent reasons that the distinction ends up being insignificant. Who cares, one might say, whether the global order actually generates poverty or merely fails to prevent it?⁴⁵ But this move, which at times seems to be one that Pogge wants to make, is precluded by his commitment to showing that global poverty engages negative duties. If we turn our backs on a distinction between what the global order brings about or enables and what it fails to prevent, we thereby give up on the distinction between negative and positive duties, and are therefore no longer entitled to claim that the obligation to reform current institutions or compensate the global poor has the special stringency associated with negative duties.

4. Implications for Pogge's Conclusions

According to Pogge, all that needs to be shown in order to engage one's negative duties is that there is a reasonable alternative to the status quo such that the alternative foreseeably leads to fewer human rights deficits, than the status quo. This leads him to conclude that we have negative duties to pursue a wide range of institutional reforms, many of which he has explored in impressive detail. In response, I have been arguing that Pogge mistakenly sets the bar for engagement

⁴⁴ As I hope is clear, the only part of this conclusion I am rejecting is the word "negative." My argument is not meant to deny that whenever an institutional structure foreseeably results in a situation in which some are in severe poverty there is a duty, sometimes negative, sometimes positive, not to participate in that structure, provided there is a reasonable alternative that would foreseeably avoid or lessen the poverty.

⁴⁵ As discussed in Section 2, this sort of perspective is endorsed by Cohen (2010), Satz (2005), Mieth (2008) and Lichtenberg (2010).

of negative duties too low. If I am correct, negative duties only come into play when the status quo actually contributes to global poverty or other human rights deficits, either by directly causing them or enabling them. In this section, I will explore the significance of my analysis for conclusions about the extent of the negative duties of citizens of affluent nations. My aim will not be to defend specific conclusions about these negative duties. Instead, I will attempt to show two things: first, that we can identify intelligible questions whose answers would reveal genuinely negative duties, and second, that these questions and their likely answers are distinct from the questions and answers that follow from Pogge's analysis that fails to distinguish negative from positive institutional duties.⁴⁶ In order to demonstrate this, I will focus on two aspects of the global order that Pogge has discussed and criticized: the system of intellectual property rights in pharmaceuticals and what Pogge calls the international resource and borrowing privileges.

4.1 Pharmaceuticals

Pogge, both in his own writing and in work authored jointly with Aidan Hollis, is highly critical of the current system of intellectual property rights in pharmaceuticals, which is governed by the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement.⁴⁷ The central feature of the TRIPS regime is that developing countries are required to enforce monopoly patents on pharmaceuticals.⁴⁸ TRIPS does allow emergency use of compulsory licenses through which a government can legitimately force a patent holder to allow generic production of a patented medication, but the system is set up so that this is the exception rather than the norm. Hollis and Pogge (2008) raise two sorts of objections to this system. The first problem is that in most cases the current regime requires developing countries to forbid the manufacture and sale of generic alternatives to existing life-saving medications. Protecting patents in this way

⁴⁶ If successful, this will help quell worries like those expressed by Satz (2005) according to which Pogge does not fully acknowledge how difficult it is to determine the extent to which global institutions cause poverty.

⁴⁷ In this section I draw primarily on Hollis and Pogge (2008) and also on Pogge (2008: 222-261).

⁴⁸ There have been subsequent bilateral agreements that have modified and added to TRIPS, and both Pogge (2008) and Hollis and Pogge (2008) sometimes refer to the current regime as "TRIPS-plus" to acknowledge that, but for simplicity I will address only TRIPS. Nothing substantive is affected by that.

substantially increases the cost of those medications, often placing them beyond the means of the global poor. As a result, millions of people suffer from preventable or curable diseases, experiencing serious illness and in many cases premature death. The second problem is that the current regime does not provide sufficient incentive for research on drugs targeting diseases that are concentrated primarily among the poor. Pharmaceutical research is expensive, and a primary justification for any patent system is that it provides incentive for corporations to engage in such research. But this incentive depends on the idea that patients will be willing and able to pay for effective medications. When a disease is concentrated almost exclusively among the poor, the potential pay-off is relatively low. As a result, pharmaceutical corporations are far better off researching relatively unimportant health problems prevalent in affluent nations. Making an incremental improvement in the existing treatment of a relatively minor health problem suffered by the wealthy can be far more lucrative than developing a drug that has the potential to save many lives by treating a life-threatening disease concentrated among the poor.

Hollis and Pogge (2008) have a specific and detailed proposal aimed at addressing these problems. Their reform is centered on the creation of a Health Impact Fund that would reward pharmaceutical companies for developing drugs that minimize the global disease burden by increasing the number of “Quality-Adjusted Life Years.” They argue that this would encourage research into life-saving treatments for diseases concentrated among the global poor, and that it would also lead to widespread access to those treatments.

In discussing the problems with the current system and advocating their preferred reform, Hollis and Pogge explicitly appeal to the idea that there is a negative duty to adopt reasonable reforms that would foreseeably prevent great suffering (Hollis and Pogge 2008: 51-52, 57-60). If that were correct, both of the problems identified above would be ones that engage negative duties. In other words, there would be a negative duty to seek out and implement reforms that would both make existing life-saving drugs more widely available and lead to the development of new treatments for life-threatening diseases. In contrast, I contend that there is an important difference between the two problems that Hollis and Pogge have identified. If the current system prevents the global poor from having access to life-saving medications they would otherwise have, then there is

a negative duty to reform the system. On the other hand, if the current system fails to provide adequate incentive to spur research into diseases concentrated among the poor, this is not yet enough to underwrite a negative duty to reform. In order to get to a negative duty, it would have to be the case that the current system discourages such research. Otherwise, there may very well be a duty to adopt reforms encouraging research into these diseases, but it will not be a negative duty.

If I am correct, identifying genuinely negative duties to reform the existing regime of intellectual property rights in pharmaceuticals requires a baseline of comparison in order to draw a distinction between what the current system discourages and what it fails to encourage. As indicated in Sections 1 and 3, Pogge sometimes expresses skepticism about whether it is possible to identify relevant baselines that are precise enough to permit meaningful comparisons without falling into the trap of conflating “less harmful” with “not harmful.” I am willing to concede that it may not always be easy to settle on an appropriate and informative baseline for sorting negative from positive institutional duties, but I would argue that this is what we must do if we are serious about the distinction. Fortunately, in this particular case the correct baseline is both relatively easy to identify and informative, or so I claim. To see this, keep in mind that the aim is to determine whether there is a negative duty to reform the current global order governing intellectual property rights in pharmaceuticals. The appropriate comparison, therefore, is to an alternative under which there is no global order governing these rights. This is not the idea of a world without any global order at all, which may very well be so far removed from reality that it is insufficiently precise as a basis for comparison. Rather, the appropriate baseline is a situation in which each state is free to set its own standards for intellectual property rights. That would be a situation with no global institutional structure governing those rights, and so it is the appropriate comparison if we want to know whether the existing system encourages or discourages research.⁴⁹

Prior to TRIPS, in what is often called the pre-TRIPS regime, states were essentially free to set their own protections for intellectual property rights. The

⁴⁹ It is possible that there are other elements of the global order that either encourage or discourage pharmaceutical research, and I readily concede that the analysis I am offering here does not address that possibility. This limitation is acceptable given that the aim is to figure out whether there is a negative duty to reform the TRIPS regime.

appropriate baseline comparison is therefore not a wildly hypothetical scenario or a situation from the distant past, but instead a relatively small departure from the current global order that has been realized in recent history. As a result, it is quite possible to draw informed and meaningful comparisons that can reveal the extent to which the current system contributes to harm suffered by the global poor, and thereby reveal the extent to which there are negative duties to seek out and implement reforms. And in fact, Hollis and Pogge do precisely that. They argue that the current system has the advantage over pre-TRIPS of providing greater incentives to research new medications, especially medications for diseases concentrated among the poor, and that it has the disadvantage of making it more difficult for the global poor to access currently existing life-saving treatments. Although they seem to indicate support for the conclusion that the current system makes things worse overall for the global poor, they ultimately avoid defending a clear conclusion on that issue in order to concentrate on the ways that their preferred reform is superior to both the current system and the pre-TRIPS regime (Hollis and Pogge 2008: 52-54).

I, too, will avoid drawing conclusions about the relative merits of the status quo and pre-TRIPS, although for a different reason. I am not, in this paper, defending a particular set of negative institutional duties with respect to the global order, but instead clarifying what must be shown in order to establish such a negative duty, and indicating the range of possible conclusions. For those purposes, it is important to notice that Hollis and Pogge's own analysis undermines their claim that there is a negative duty to create their Health Impact Fund. After all, they themselves argue that the current system has the advantage over pre-TRIPS of providing increased incentives into research, particularly on diseases concentrated among the poor. Even if they are correct that the Health Impact Fund would greatly enhance these incentives, that would not underwrite a negative duty to create it.⁵⁰ To see this, notice that any negative duty to reform TRIPS could be realized simply by allowing states to set their own rules governing intellectual property rights in pharmaceuticals, which would amount to

⁵⁰ For the record, it seems to me they are correct about the incentives the Health Impact Fund would create. Those incentives are part of what I take to be a very strong case for a moral obligation to institute the Health Impact Fund, or something like it. But I would nonetheless insist that if we are going to distinguish between positive and negative duties, the fact that the Health Impact Fund would provide strong incentives to discover treatments for widespread life-threatening diseases supports a positive duty to create the Fund, not a negative one.

a reversion to pre-TRIPS. If Hollis and Pogge are right, this would result in even less of an incentive to research diseases concentrated among the poor than exists under the status quo. Such lack of incentive may be morally objectionable, but there is a difference between being morally objectionable and violating a negative duty, or at least that is Pogge's view, and it is one I have attempted to defend.

If we are serious about distinguishing negative from positive duties, here is where we stand with respect to intellectual property rights in pharmaceuticals. First, we must face the question of whether the current system is better or worse for the global poor than pre-TRIPS.⁵¹ If better, then there are no negative duties to reform, although Hollis and Pogge's analysis may nonetheless demonstrate positive duties to create the Health Impact Fund. If worse, then there are negative duties to reform. These duties could be discharged either by reverting to pre-TRIPS or through any reform that eliminates the harm generated by the current system. For instance, if the problem with the current system relative to pre-TRIPS is that the harm of denying access to existing treatments outweighs the benefit of providing greater incentives for important research, then it seems likely that strengthening the compulsory license component of the current system could correct that problem and make the system better for the global poor than pre-TRIPS.⁵² Such a modification, if effective, would discharge the negative institutional duties to reform. As I have emphasized, this is true even if Hollis and Pogge's analysis successfully demonstrates the existence of further, positive duties to institute the Health Impact Fund.

4.2 Resource and Borrowing Privileges

Another element of the current global order that Pogge has criticized is the international status granted to whoever is able to gain power in a region or state.⁵³ In developing this criticism, he has identified the "international resource

⁵¹ As indicated in Section 3, it is important to keep in mind that there is no special burden of proof one way or the other in making these judgments. Our conclusions should go wherever the preponderance of the evidence leads.

⁵² Notice that unlimited compulsory license would effectively convert the current system into pre-TRIPS, so what is being claimed here is simply that there is some standard for compulsory license that eliminates the problem of lack of access to life-saving medications without completely undermining the entire TRIPS framework.

⁵³ This line of criticism is developed most fully in Pogge 2008. For a succinct statement of Pogge's view of the problem, see Pogge 2007: 48-51.

privilege” as the right to sell the natural resources of the nation one is governing and the “international borrowing privilege” as the right to use those natural resources as collateral when securing loans.⁵⁴ In each case, Pogge’s fundamental concern is that the current system is too liberal in extending these privileges. In current practice, any individual or group that is able to gain effective control over a state is granted these privileges, with only very limited restrictions. Pogge argues that this creates a strong incentive for military coups and also provides oppressive dictators with the ability to remain in power in spite of public opposition. The overall effect, as Pogge sees it, is to generate the so-called “resource curse,” which is the perhaps surprising fact that resource rich developing nations tend to be more impoverished than resource poor ones.

There is room for debate over whether Pogge is correct about the effects of the current resource and borrowing privileges, but for the sake of argument I will grant his analysis.⁵⁵ What I want to focus on is the significance of that analysis for negative institutional duties. If we are granting that the current resource and borrowing privileges lead to more frequent military coups and greater stability for oppressive regimes, then clearly such privileges contribute to harming the global poor and just as clearly there are negative duties to reform those privileges. The question is how to determine what it would take to discharge these negative duties. There are, I contend, two importantly different ways of thinking about how to answer that question. One possibility would be to ask something like: what reasonable policies for the sale and purchase of natural resources and the use of those resources as collateral would foreseeably lead to the least global poverty? Another possibility would be to ask something like: what reasonable policies for the sale and purchase of natural resources and the use of those resources as collateral would prevent the purchaser or the lender from generating global poverty? As should be clear, the former approach is indicated by Pogge’s view that there is a negative duty to adopt any reasonable institutional reform that would foreseeably lead to less severe poverty or fewer human rights deficits, whereas the latter approach reflects the distinction I have been advocating

⁵⁴ The resource privilege manifests as part of the global order insofar as courts around the world recognize and enforce property rights that result from the purchase of natural resources.

⁵⁵ For the view that Pogge overstates the extent to which these privileges affect global poverty, see Cohen (2010: 37-40).

between positive and negative institutional duties. To reflect that, I will refer to the former as the Least Poverty Test and the latter as the Caused Poverty Test.

If we opt for the Caused Poverty Test, there are two fundamental empirical questions that must be answered in order to evaluate a given policy governing the extension of the resource and borrowing privileges. First, does this policy create incentives for military coups or other non-democratic attempts to gain power? Second, does this policy promote the stability of oppressive or corrupt regimes that themselves contribute to global poverty? Pogge has argued that for the status quo the answer to both questions is “yes.” If that is correct, then the negative duty to reform the status quo consists in an obligation to find an alternative policy under which the answers are “no,” and then work to implement that alternative.

If, on the other hand, we opt for the Least Poverty Test, we face a different set of empirical questions, along the following lines. Under the current system, what is the scope and degree of global poverty? Can we imagine an alternative system that would be reasonable to implement and that would foreseeably lead to a reduction in this poverty? On this approach, given the existence of severe global poverty under the status quo, the relevant negative institutional duties are creatively to imagine alternative systems and then work towards whatever reasonable system is most likely to lead to the greatest reduction in global poverty.

In either case, the relevant empirical questions are difficult to settle, and I will not attempt to resolve either set of questions here. But even without finding complete answers, I think we can see that the two approaches are likely to lead to different conclusions. In the case of the Caused Poverty Test, the most natural solution would be to adopt a policy that restricted the resource and borrowing privileges to regimes that meet some standards of democracy or domestic accountability.⁵⁶ Such standards would eliminate incentives to seize power illegitimately, and they would prevent the resource and borrowing privileges from sustaining regimes that lack public support. It is not clear exactly how rigorous such standards would need to be in order for the policy to pass the Caused Poverty Test, but it seems likely that some such standards would be sufficient. Moreover, insofar as any standards along these lines constitute incentive to implement

democratic processes or other systems of domestic accountability, the standards would probably not need to be overly strong in order to prevent the purchasers and lenders from contributing to global poverty.

In contrast, the Least Poverty Test appears likely to be far more demanding. On this approach, there is no principled limit on what sort of constraints one could insist a regime must meet in order to earn the resource and borrowing privileges. Some constraints aimed at reducing global poverty might be ineffective or have perverse effects, but according to the Least Poverty Test there is a negative duty to implement any constraint that would foreseeably be effective. It is, of course, possible that only those constraints demanded by the Caused Poverty Test actually would foreseeably lead to reductions in poverty. But I see no reason to suspect that to be the case, and good reason to doubt it, given that it would be purely coincidental. As a result, there is good reason to suspect that the Least Poverty Test and the Caused Poverty Test lead to different conclusions about what would be required to discharge the negative duty to reform the current resource and borrowing privileges.

In presenting his own proposal for how to remedy the problems created by the resource and borrowing privileges, Pogge (2008: 152-73) shifts perspective and addresses the question of what it would make sense to do as a fledgling democracy rather than talking directly about the duties of others to reform the system. He advocates constitutional amendments that set standards for when a future government should have the authority to sell national resources or borrow against them, with the implication that outsiders would then have a negative duty to respect those standards. Although Pogge's recommendations may be similar to ones that could be endorsed from within the Caused Poverty Test framework, his approach to the question fits more comfortably within the framework of the Least Poverty Test.⁵⁷ In asking what restrictions on the resource and borrowing privileges it makes sense to endorse from the perspective of a fledgling democracy, there is no need to distinguish between resource sales or loans that harm or enable harm and those that fail to help. Instead, from the perspective of a

⁵⁶ Although he does not articulate it in these terms, Wenar (2008) develops and defends a specific proposal for reforming the resource and borrowing privileges that appears to operate within the framework of the Caused Poverty Test.

⁵⁷ Pogge's recommendations are not far from those endorsed by Wenar (2008), whose analysis I have suggested fits within the Caused Poverty Test framework. See also Wenar (2010) and Pogge (2010b: 221-231).

fledgling democracy it makes sense to prefer whatever rules are most effective at combating severe poverty and oppression within one's own country. Under the Least Poverty Test, those considerations translate directly into the negative duties of others, but that is not necessarily the case under the Caused Poverty Test.

5. Conclusion

I have been arguing that Pogge's analysis effectively treats all institutional duties as negative ones, thereby neglecting an important distinction between positive and negative institutional duties. This, I have claimed, leads Pogge to overestimate the demands of the genuinely negative institutional duties engaged by global poverty. In addition to making this claim, I have attempted to demonstrate that it is possible to respect the distinction between negative and positive institutional duties and thereby draw more accurate conclusions about the negative duties associated with global poverty. Although I have not defended precise conclusions of this sort, I have attempted to identify the empirical issues relevant to the specification of the negative duties involving the system of intellectual property rights in pharmaceuticals and the international resource and borrowing privileges. In doing so, I have tried to show both that there are good reasons for thinking a fully worked out account will reveal substantial negative duties to reform current institutions and that these duties will nonetheless fall importantly short of the duties asserted by Pogge and suggested by his analysis.

Like Pogge, by focusing on negative duties I am not denying the significance of positive ones. Unlike Pogge, my analysis suggests that the negative duties engaged by global poverty, though significant, do not demand as much as typical accounts of the positive duties to eliminate such poverty. Clarity on this point strikes me as important, for both theoretical and practical reasons. To begin with, I share Pogge's expressed sympathy for the view that negative duties really are more stringent than positive ones. If there is a genuine difference in stringency, then properly drawing the distinction between negative and positive duties will affect the appropriate conclusions about how to respond to global poverty, and how to assess to the responses of others.

On the practical side, greater care in identifying genuinely negative institutional duties is important because it seems likely to make a Pogge-inspired

argument more convincing to those who, legitimately in my view, had worried that Pogge's own analysis conflated the distinction between positive and negative duties or overly broadened the concept of harm. As Pogge has often asserted, one of the advantages of focusing exclusively on the negative duties engaged by global poverty is that many people find it easier to justify or rationalize dismissing their positive duties than their negative ones. Those who have the impression that Pogge's argument somehow illicitly conflates positive and negative duties may be tempted to reject his entire approach and conclude that they have no genuinely negative duties towards the global poor. I have attempted to identify the source of this impression, which I believe to be veridical, but also to show that there likely are extensive negative duties engaged by global poverty. Although I certainly would not expect my suggested revision of Pogge's analysis to ensure that the resulting argument has motivational force for all, I do think that acknowledging the limits of a negative duty analysis of global poverty and confining the discussion to genuinely negative institutional duties will make it more difficult for people to dismiss the conclusions.

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